UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTOPHER HUDSON, in his individual capacity on behalf of himself and others similarly situated, Plaintiff, v. NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, RETIREMENT BOARD OF THE BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN, KATHERINE "KATIE" BLACKBURN, RICHARD "DICK" CASS, TED PHILLIPS, SAMUEL MCCULLUM, ROBERT SMITH, and JEFFREY VAN NOTE, Defendants.	No. 1:18-cv-4483-RWS-RWL **AMENDED CLASS ACTION COMPLAINT**

Plaintiff, Christopher Hudson, by and through his undersigned attorneys, brings this class action complaint on behalf of himself and all others similarly situated allege facts related to his claim based on personal knowledge and all other facts based on investigation of counsel.

NATURE OF THE ACTION

1. Plaintiff Christopher Hudson, a former, now-disabled National Football League ("NFL") football player, brings this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, on behalf of a Class of participants in and beneficiaries of the Bert Bell/Pete Rozelle NFL Player Retirement Plan (the "Plan") against the fiduciaries of the Plan to remedy their failure to make critical disclosures about the Plan that have harmed disabled participants to obtain reclassification of their category of benefits under the Plan.

2. Defendants are the administrators and fiduciaries of a disability retirement program for NFL players. As fiduciaries of the Plan, Defendants have an obligation, characterized as the highest known to the law, to fairly administer the retirement plan for these players and to make proper disclosure of important information about the terms of the Plan. Defendants have breached these duties by adopting undisclosed interpretations of key terms and failing to reveal that these terms have a particular interpretation and the meaning of these undefined, and critical terms in the Plan until the very end of the administrative process when the player-participant has sought a reclassification.

3. As a result of these failures to disclose, the players disabled by League-related head trauma will have sought an initial classification of benefits without being told that doing so will jeopardize his ability to seek a classification at a different category or at the very least that he will be subject to a much higher standard of evidence and proof. The effect of these failures to disclose, is that while the Plan purports allow for reclassification, these undisclosed terms and hidden interpretation of key provisions create a trap for the unwary so that it is effectively impossible for any of these players to ever see their disability status reclassified.

4. On behalf of himself and the class, Plaintiff Hudson seeks to end this practice in order to require the Plan fiduciaries to make proper disclosures so that participants are fully informed about the standards and requirements when they seek benefit under the Plan.

JURISDICTION AND VENUE

Subject Matter Jurisdiction

7. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this action arises under the laws of the United States and pursuant to 29 U.S.C. §

1132(e)(1), which provides for federal jurisdiction of actions brought under Title 1 of ERISA.

Personal Jurisdiction.

8. This Court has personal jurisdiction over Defendants because Defendants transact business in and have significant contacts with this District, and because ERISA provides for nationwide service of process pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2).

Venue.

9. Venue is proper in this District pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), and 28 U.S.C. 1391(b) and (c) because some of the breaches and violations giving rise to the claims occurred in this District, and at least one of the Defendants may be found in this District.

THE PARTIES

10. Plaintiff Christopher Hudson is a former professional football player with the National Football League (the "NFL") within the meaning of Article 1.29 of the 2009 Plan Document. He began his career in the NFL with the Jacksonville Jaguars in 1995. Hudson played with the Jacksonville Jaguars from 1995 until 1999, the Chicago Bears from 1999 until 2001, and the Atlanta Falcons from 2001 until he retired from the NFL in 2003. Hudson is a "participant" in the Plan, as defined under 29 U.S.C. § 1002(7), and a "Vested Player" as defined in Article 1.37 of the Plan.

11. Defendant National Football League Management Council ("NFL Management Council") is a non-profit association of clubs of the NFL that is based in New York City. Pursuant to Article 10.2 of the 2009 Plan Document, the Management Council when acting jointly with the Players Association had the power to amend the Plan. Pursuant to Article 8.1 of the 2009 Plan

Document, the NFL Management Council had the authority to appoint three voting members of the Retirement Board and also to remove and appoint a replacement for any member of the Retirement Board that the NFL Management Council has appointed. By virtue of these powers to appoint and remove other fiduciaries, Defendant NFL Management Council was a fiduciary of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), and had the fiduciary responsibility to monitor the Retirement Board as an entity and the members of the Board whom it appointed, and remedy any fiduciary violations committed by the Retirement Board.

12. Defendant National Football League Players Association ("NFLPA") is the labor organization representing the professional American football players in the National Football League. Pursuant to Article 10.2 of the 2009 Plan Document, the NFL Players Association when acting jointly with the NFL Management Council had the power to amend the Plan. Pursuant to Article 8.1 of the 2009 Plan Document, the NFL Players Association had the authority to appoint three voting members of the Retirement Board and also to remove and appoint a replacement for any member of the Retirement Board that the NFL Management Council has appointed. By virtue of these powers to appoint and remove other fiduciaries, Defendant NFL Players Association was a fiduciary of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), and had the fiduciary responsibility to monitor the Retirement Board as an entity and the members of the Board whom it appointed, and remedy any fiduciary violations committed by the Retirement Board.

13. Defendant Retirement Board is identified in Article 1.3 of the Plan Document as the designated Plan Administrator of the Plan within the meaning of ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A), and a named fiduciary of the ESOP within the meaning of ERISA § 402, 29 U.S.C.

§ 1102. The Retirement Board is and has been a fiduciary of the Plan under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), because it exercised discretionary authority or discretionary control respecting management of the ESOP, and/or had discretionary authority or discretionary responsibility in the administration of the ESOP. Specifically, under Article 8.2 of the Plan, Defendant Retirement Board was responsible for, *inter alia*, the following: defining the terms of the Plan and Trust; construing the Plan and Trust; reconciling any inconsistencies in the definition or interpretation of the Plan and Trust; deciding claims for benefits; paying all reasonable and necessary expenses of the Plan; adopting procedures, rules, and forms; delegating authority as necessary in administration of the Plan; selecting Trustees and setting forth terms of the Trust; commencing or defending suits or legal proceedings involving the Plan and the Trust; and settling, compromising, or submitting to arbitration for claims, debts, or damages due or owing to or from the Plan or Trust. Pursuant to the Summary Plan Description ("SPD"), the Retirement Board is composed of six voting members three of whom are selected by the NFLPA and three of whom are selected by the NFL Management Council.

14. Defendant Katherine "Katie" Blackburn is identified by the 2015 SPD and the 2013 SPD as one of the Management Members of the Retirement Board. Defendant Blackburn is the Executive Vice President of the Cincinnati Bengals. As a result of her membership on the Retirement Board of Directors, Defendant Blackburn is and has been at relevant times a fiduciary of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21).

15. Defendant Richard W. "Dick" Cass is identified by the 2015 SPD and the 2013 SPD as one of the Management Members of the Retirement Board. Defendant Cass is the President of the Baltimore Ravens. As a result of his membership on the Retirement Board of Directors,

Defendant Cass is and has been at relevant times a fiduciary of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21).

16. Defendant Ted Phillips is identified by the 2015 SPD and the 2013 SPD as one of the Management Members of the Retirement Board. Defendant Phillips is the CEO/President of the Chicago Bears. As a result of is membership on the Retirement Board of Directors, Defendant Phillips is and has been at relevant times a fiduciary of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21).

17. Defendant Samuel McCullum is identified by the 2015 SPD and the 2013 SPD as one of the Player Members of the Retirement Board. As a result of his membership on the Retirement Board of Directors, Defendant McCullum is and has been at relevant times a fiduciary of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21).

18. Defendant Robert Smith is identified by the 2015 SPD and the 2013 SPD as one of the Player Members of the Retirement Board. As a result of his membership on the Retirement Board of Directors, Defendant Smith is and has been at relevant times a fiduciary of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21).

19. Defendant Jeffrey Van Note is identified by the 2015 SPD and the 2013 SPD as one of the Player Members of the Retirement Board. As a result of her membership on the Retirement Board of Directors, Defendant Blackburn is and has been at relevant times a fiduciary of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21).

20. The "Board Defendants" collectively refer to Defendants Blackburn, Cass, Phillips, McCullum, Smith, Van Note and the Retirement Board as an entity.

FACTUAL ALLEGATIONS

The Retirement Plan

21. The Bert Bell/Pete Rozelle NFL Player Retirement Plan is an employee pension benefit plan within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A). The relevant written instrument of the Plan within the meaning of ERISA § 402(a) is the Bert Bell/Pete Rozelle NFL Player Retirement Plan Amended and Restated as of April 1, 2009). Since at least 1994, the Plan has provided retirement, disability, and related benefits to eligible professional football players. Even though there is a separate NFL Player Supplemental Disability & Neurocognitive Benefit Plan, that Plan only applies to benefits payable, and claims for benefits made, on or after April 1, 2017. The Bert Bell/Pete Rozelle NFL Player Retirement Plan continues to pay total and permanent disability benefits based on claims filed prior to January 1, 2015. The Bert Bell/Pete Rozelle NFL Player Retirement Plan is the Plan that governs Plaintiff's disability benefits.

22. Article 5 of the 2009 Plan Document addresses Total and Permanent Disability ("T&P") benefits. Article 5.1 defines "Eligibility and Amount" as follows: "Any Active Player or Vested Inactive Player . . . who is not receiving retirement benefits and is determined by the Retirement Board or the Disability Initial Claims Committee to be totally and permanently disabled as defined in section 5.2, and who satisfies the other requirements of this Section 5, will receive a monthly total and permanent disability benefit for the months described in sections 5.6 and 5.7[]."

23. Article 1.36 of the 2009 Plan Document defines "Vested Inactive Player" to mean a "Vested Player who is not an Active Player." Article 1.37 of the Plan defines "Vested Player" as a Player who "(a) earns five Credited seasons…" Article 2 address eligibility under the Plan,

noting that "[a]ll Players participate in the Plan."

24. Article 5.1(d) of the 2009 Plan Document provides for Inactive benefits as follows: "This category applies if (1) the total and permanent disability arises from other than league football activities while the Player is a Vested Inactive Player, or (2) the disability(ies) arises out of League football activities and results in total and permanent disability fifteen or more years after the end of the Player's last Credited Season. The minimum benefits provided under this Section 5.1(d) will be offset by any disability benefits provided by an employer other than the League or an Employer, but will not be offset by worker's compensation."

25. Article 5.1 of the 2009 Plan Document also provides four categories of T&P benefits, two of which are relevant. First, Article 5.1(c) provides for Football Degenerative ("FD") benefits as follows: "The monthly total and permanent disability benefits will be no less than $4,000 if the disability(ies) arises out of League football activities, and results in total and permanent disability before fifteen years after the end of the Player's last Credited Season." Payments for Football Degenerative benefits have been routinely increased each year. Monthly payments from 2010 to August 2011 were $8,167.00; from September 2011 to December 2015 payments were $9,000; and from January 2016 to present, monthly payments are $10,250.00. Conversely, payments for monthly T&P benefits were $2,300.50 from October 2010 to August 2011; $3,333.50 from September 2011 to December 2015; and $4,166.50 from January 2016 to present.

26. Article 5.2(a) of the 2009 Plan Document provides that "An eligible Player will be deemed to be totally and permanently disabled if the Retirement Board or the Disability Initial Claims committee finds that he has become totally disabled to the extent that he is substantially

prevented from or substantially unable to engage in any occupation or employment for remuneration or profit, but expressly excluding any disability suffered while in the military service of any country[].” At the time of the Board decision at issue, Article 5.2(b) of the Plan provided:

> Social Security Awards. Effective April 1, 2007, a Player who has been determined by the Social Security Administration to be eligible for disability benefits under either the Social Security disability insurance program or Supplemental Security Income program, and who is still receiving such benefits at the time he applies, will be deemed to be totally and permanently disabled . . .

Solomon v. Bert Bell Pete Rozelle NFL Player Ret. Plan, 2016 U.S. Dist. LEXIS 27748, *10-11 (D. Md. Mar. 4, 2016).

27. Article 5.5(a) of the 2009 Plan Document, entitled Initial Classification, provides “Classification of total and permanent disability benefits under Section 5.1 will be determined by the Retirement Board or the Disability Initial Claims Committee in all cases on the facts and circumstances in the administrative record[].”

28. Article 5.5(b) of the 2009 Plan Document, entitled Reclassification, provides: “A Player who becomes totally and permanently disabled and who satisfies the conditions of eligibility for benefits under Section 5.1(a), 5.1(b), 5.1(c), or 5.1(d) will be deemed to continue to be eligible only for the category of benefits for which he first qualifies, unless the Player shows by evidence found by the Retirement board or the Disability Initial Claims Committee to be clear and convincing that, because of changed circumstances, the Player satisfies the conditions of eligibility for a benefit under a different category of total and permanent disability benefits…”

29. None of the materials provided by Retirement Board defined the term “changed circumstances” and Retirement Board did not notify Hudson of the definition of changed circumstances until his last and final appeal of FD benefits. Plan participants were provided

documents meant to explain the policies and procedures of the Plan, including reclassification of benefit status. In these materials, the only discussion of "changed circumstances" is as follows:

> As long as you remain totally and permanently disabled, you will continue to receive total and permanent disability benefits under the category for which you first qualify, unless you present evidence for reclassification that the Disability Initial Claims Committee or the Retirement Board finds to be clear and convincing. You must be able to demonstrate that, because of change of circumstances, you satisfy the conditions of eligibility for a benefit under a different category of total and permanent disability benefits.

Chris Hudson's Claim and Appeal of Benefits

30. Plaintiff Hudson played football for the NFL for a total of 8 years in the position of safety. Over the course of his career with the NFL in the position of safety, Hudson sustained numerous hits to the head. Just two years after his 2003 retirement from the NFL, in 2005, Hudson began complaining of headaches, dizziness, ringing ears, and blurred vision. These problems worsened in 2008, when Hudson began experiencing increased anxiety, poor decision making, inability to sit still for long periods of time, sleep problems, decreased ability to concentrate, social withdrawal, memory problems (forgetting the names of familiar people), increased occurrence of headaches, and sensitivity to lights.

31. Participants in the Plan are eligible to apply for both T&P disability benefits and FD benefits. Hudson filed an initial application for disability under the Plan on March 9, 2010.

32. Hudson then filed an appeal with Retirement Board on July 27, 2010 and Hudson was sent to "MAP neuro Rehab Institute of Chicago" for further testing.

33. Subsequently, the Retirement Board awarded Plaintiff T&P disability benefits under the Plan on May 20, 2011. In its May 20, 2011 decision, the Retirement Board determined that Hudson was ineligible for FD benefits. In its decision, Retirement Board concluded that

Hudson was "severely depressed" and experienced cognitive impairments attributable to non-League related mood disorder. In subsequent communications with Hudson on November 28, 2011, Retirement Board explained that it had determined that T&P related injuries were "not related to League football activities."

34. After the May 20, 2011 award of T&P benefits, Hudson filed for Social Security disability benefits on June 27, 2012. On May 5, 2014, the Social Security Administration found that Hudson was disabled as of December 31, 2009.

35. Subsequent to the Social Security Administration's decision, Hudson, proceeding *pro se*, sought for his T&P Benefits to be reclassified as FD Benefits by filing a claim for benefits under the Plan on September 16, 2014. As part of his request for reclassification, Hudson explained that he had "clear and convincing evidence" of "changed circumstances" within the meaning of the Plan, or at least the SPD, based, in part, on Social Security Administration's decision as well as a mental residual functional capacity questionnaire completed by Dr. Samuel Holcombe.

36. On October 8, 2014, the Retirement Board denied Hudson's request for reclassification. In its decision, the Initial Claims Committee never defined how the Committee or the Retirement Board interpreted "changed circumstances." Moreover, the Initial Claims Committee never explained how it weighed the evidence submitted by Hudson for its consideration. In its denial, the Initial Claims Committee also notified Hudson of his right to appeal as well as his ability to "submit written comments, documents and any other information that you believe shows you qualify for these benefits."

37. On March 27, 2015, Hudson appealed Retirement Board's decision. As part of his appeal of the denial of reclassification, Hudson presented the Retirement Board with numerous

pieces of new medical evidence for its consideration.

38. In a decision dated May 21, 2015, but received by Mr. Hudson on May 27, 2015, Defendant Retirement Board issued its final decision denying Hudson's appeal for reclassification, finding that Hudson failed to meet its "changed circumstances" requirement:

> At its May 14, 2015 meeting, the Retirement Board reviewed the entire record underlying your appeal and determined that your request for reclassification must be denied. Section 5.55(b) governs requests for reclassification such as yours, and it permits reclassification of T&P benefits only where a Player provides "clear and convincing" evidence of "changed circumstances" warranting "a different category of total and permanent disability benefits." In this and all other instances, the Retirement Board interpret Section 5.5(b)'s "changed circumstances" requirement to mean a change in Player's physical condition—such as a new or different impairment—that warrants a different category of benefits.

39. In its denial, Retirement Board – for the first time – provided Hudson with a written explanation of how it interprets "changed circumstances." This explanation was never conveyed to Hudson in any way prior to the final denial. Furthermore, the record contains no proof that Retirement Board submitted any of the evidence Hudson provided to any medical source for evaluation and consideration prior to making its final decision.

The Retirement Board Consistently Failed to Disclose Important Information to Participants

40. According a *New York Times* dated August 14, 2019, entitled "He Signed the Denial Letter. Now He Helps Former N.F. L. Players Get Benefits," Paul Scott was formerly employed by the Plan Administrator as "the point person telling players what paperwork they needed to apply for disability benefits." According to the *New York Times* article, Mr. Scott was instructed to "tell the players only what they needed to submit, not how to submit it."

41. Mr. Hudson's experience was similar to what was described by the *New York Times*. After he was granted inactive benefits but before filing his request for reclassification,

Hudson spoke on multiple occasions with Paul Scott, Sam Vincent, and an employee named "Laura", representatives of the Plan Administrator, to ask questions about the process of and requirements for reclassification. None of these employees advised Mr. Hudson what he would need to show to seek reclassification, except that one employee stated to Mr. Hudson that he would need to show "new findings about what was happening." None of the representatives of the Plan Administrator that Mr. Hudson spoke to told Mr. Hudson anything else regarding the Plan's interpretation of the term "changed circumstances" or the kind of proof needed to show "changed circumstances."

42. Confidential Witness #1 ("CW1") is a person who had significant responsibility for administering the Plan between at least 2004 and 2016, including with respect to Plan's disclosures to and communications with Plan participants. CW1 spoke to Mr. Hudson in 2017. During that conversation in 2017, Mr. Hudson inquired about the meaning of "changed circumstances." CW1 responded that the Board "deliberately keeps the language vague."

43. According to CW1, in the course of carrying out CW1's responsibilities, CW1 received numerous calls from players who did not understand the SPD. The Board specifically instructed the Plan Administrator not to provide players who called with questions regarding reclassification with any information other than to refer them to the language of the SPD or to the NFLPA.

44. According to CW1, the language of the SPD and the Plan were "vague on purpose" and provided no helpful information to participants. The Board kept "secret definitions" for terms including "clear and convincing," "total and permanent disability," and "changed circumstances" that were "fuzzy on purpose" and not disclosed to Plan participants. CW1 believed that the Board

was rubber-stamping the decisions made by others.

45. According to CW1, in the course of carrying out CW1's responsibilities CW1 was repeatedly cautioned against helping Plan participants and instructed that he had an obligation to be "neutral." It was clear to CW1 that neither the NFLPA nor the Management Council wanted the Plan Administrator to be answering the questions of Plan participants and that neither was interested in helping the retired players with their benefits and the NFLPA had to keep in mind how the awards would affect the current players.

46. Mr. Hudson's experiences, the statements of Paul Scott in the *New York Times*, and the statements of CW1 comport with and are corroborated by the experiences of other former NFL players. For example, Joe Phillips, a former NFL football player and a Plan participant, contacted the Plan Administrator multiple times between 2009 and 2015 regarding his intention to request reclassification of benefits under the Plan. Mr. Phillips called at least a dozen times expressing that he did not understand the SPD and asked questions about the process for reclassification and clarification about terms in the SPD meant. Despite his repeated questions, the Plan Administrator failed to explain the standard of "changed circumstances" or proof needed to prove "changed circumstances" to Mr. Phillips. The Plan Administrator repeatedly referred him to the language of the Plan in response to his questions.

47. Leonard Marshall, a former NFL football player and a Plan participant, also repeatedly contacted the Plan Administrator regarding his intention to request reclassification of benefits under the Plan. Mr. Marshall called between three and five times to ask questions about the process for reclassification and what terms in the SPD meant. Similar to the experience of Mr. Hudson and Mr. Phillips, the Plan Administrator did not answer Mr. Marshall's questions. The

Plan Administrator did not explain the standard of "changed circumstances" or the kind of proof needed to establish "changed circumstances." The Plan Administrator did not direct Mr. Marshall to any case law. Instead, the Plan Administrator instructed Mr. Marshall to contact the NFL Players Association with his questions. Mr. Marshall then contacted the NFL Players Association, spoke to multiple people at length, expressed his confusion, but did not receive answers to his questions.

The NFL Players Association & NFL Management Council Knew or Should Have Known of the Board Defendants' Breaches

48. Mr. Marshall's conversations with multiple representatives of the NFLPA after having been referred by the Plan Administrator should have alerted the NFLPA that the Board Defendants were in breach of their duties not to misinform Plan participants, to affirmatively inform participants where silence would be harmful, and to convey complete and accurate information to Plan participants material to their circumstances regarding the standard for reclassification under the Plan and the "changed circumstances" requirement.

49. The persistently high rate at which retired players file suits regarding the denial of their benefits under the Plan should have alerted the NFLPA and NFL Management Council not only about a potentially deficient process of benefit awards, but also that the Board Defendants were failing to provide adequate information to participants. A prudent fiduciary would have investigated the causes of this persistently high rate of suits regarding benefit denials and discovered that the Board Defendants were in breach of their duties to affirmatively inform participants where silence would be harmful, and to convey complete and accurate information to Plan participants material to their circumstances including regarding the standard for

reclassification under the Plan and the "changed circumstances" requirement.

50. The existence of multiple lawsuits against the Board relating to interpretation of the term "changed circumstances" under the Plan—including by participants and former NFL players Jeffrey D. Bryant, Brent V. Boyd, and Jesse Solomon—should have alerted the NFLPA and the NFL Management Council that the Board Defendants were in breach of their duties not to misinform Plan participants, to affirmatively inform participants where silence would be harmful, and to convey complete and accurate information to Plan participants material to their circumstances regarding the standard for reclassification under the Plan and the "changed circumstances" requirement. A prudent fiduciary would have investigated the facts of these cases and discovered that the Board Defendants were in breach of their duties to affirmatively inform participants where silence would be harmful, and to convey complete and accurate information to Plan participants material to their circumstances including regarding the standard for reclassification under the Plan and the "changed circumstances" requirement.

51. Reporting of pervasive belief by former NFL players that procedures for benefits claims for former NFL players followed a strategy of ""delay, deny, and hope they die," should have alerted the NFLPA and NFL Management Council not only about a potentially deficient process of benefit awards, but also that the Board Defendants were failing to provide adequate information to participants. On September 18, 2015, *Vice* reported in an article entitled "Battle For Benefits, Pt. 3: Don't Make Proud Men Beg," that "almost to a man, the pre-93ers [NFL retirees who played before 1993]—and some post-93ers—recite a maxim that they believe best summarizes the NFL and NFLPA's attitude regarding retired players: 'delay, deny, and hope they die.'" As discussed above, on August 14, 2019, the *New York Times* also reported that "Retired

N.F.L. players struggling with debilitating injuries years after they leave the field have a not-so-facetious way of describing the league's approach to doling out their health benefits: 'Delay, deny and hope you die.'" A prudent fiduciary would have investigated the basis for this widespread perception and discovered that the Board Defendants were in breach of their duties to affirmatively inform participants where silence would be harmful and to convey complete and accurate information to Plan participants material to their circumstances including regarding the standard for reclassification under the Plan and the "changed circumstances" requirement.

52. Findings and recommendations of the Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics at Harvard Law School should have alerted the NFLPA and NFL Management Council not only about a potentially deficient process of benefit awards, but also that the Board Defendants were failing to provide adequate information to participants. In May of 2017, in a publication entitled "Comparing Health Related Policies & Practices in Sports: The NFL and Other Professional Leagues," scholars at the Petrie-Flom Center described the filing process for the Plan as "complex and lengthy." In November of 2016, scholars at the Petrie-Flom Center noted that while "the NFL and NFLPA offer many benefits and programs to current and former players to help them on a wide spectrum of issues, including most importantly healthcare… many players are not taking full advantage of these programs." The scholars noted that "[i]n interviews we conducted, current and former players were generally unclear and unsure about what information they had received." The scholars recommended substantially increased levels of disclosure, transparency, and assistance to players and former players regarding benefits, including by affirmatively providing summaries of benefits to players, preparing a manual for every retiring player listing and explaining all the benefits for which they are eligible, providing such a manual

to every contract advisor and financial advisor of NFL players, making important information about the various benefit plans available to NFL players publicly available, and making "substantial investments in education along with attempts to monitor whether players understand what they are being told." The scholars specifically admonished that "bare provision of information and documents to the players is not sufficient," because "we know from behavioral science that too much information can be overwhelming and that certain approaches are more likely to result in comprehension and action." A prudent fiduciary would have investigated the basis for these scholars findings and recommendations and discovered that the Board Defendants were in breach of their duties to affirmatively inform participants where silence would be harmful, and to convey complete and accurate information to Plan participants material to their circumstances including regarding the standard for reclassification under the Plan and the "changed circumstances" requirement.

Chris Hudson's Post-Denial Requests for Information to Retirement Board

53. After the final denial, Hudson filed a federal complaint in the Northern District of Mississippi. Hudson and Defendants later entered into a voluntary remand for further consideration at the administrative level by the Retirement Board.

54. On April 1, 2016, Hudson's counsel sent the Plan Director, Michael Miller, and counsel for the Plan, Michael Junk, a Request for Clarification/Request for Information regarding the Plan's definition of "changed circumstance" and Retirement Board's definition of "impairment." Mr. Junk responded in writing, citing *Bryant v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, U.S. Dist. LEXIS 176748, *18 (N.D. Ga. Mar. 23, 2015) and *Boyd v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 796 F. Supp 2d. 682, 693 (D. Md. 2011) and noting

that "two prior court decisions upholding the Retirement Board's interpretation and application of the 'changed circumstances.'" Mr. Junk further stated that he and his colleagues are "unaware of any other instance in which the Retirement Board has interpreted the 'changed circumstances' requirement in a manner different than that explained in *Boyd*, *Bryant*, and Hudson's case…this consistency is not surprising, given that consistence is one the of the hallmarks of reasonableness in plan interpretation." Mr. Junk, however, refused to respond to Hudson's request for the definition of the term "impairment" because "it amounts to a request for an advance advisory opinion on the [term]."

55. On June 13, 2016, Hudson sent Mr. Miller and Mr. Junk a Second Request for Clarification/Request for Information. This second request, again, asked for a list of all instances where the Retirement Board has interpreted the "changed circumstances" requirement under Article 5.5(b) of the Plan as well as how Retirement Board defines the term "impairment." Neither Miller nor Junk responded to the second request.

56. Hudson renewed his requests in a Third Request for Clarification/Request for Information on September 30, 2016. In this request, Hudson added several requests "in order to analyze the Retirement Board's use of discretion in this case, and whether it abused that discretion." Hudson also sent a Request for Production of Documents – Plan Neutral Training Materials. No materials were produced in response.

57. On November 22, 2016, the Plan issued its "Final Decision Regarding Request for Reclassification," denying Hudson's request to be reclassified from T&P to Football Degenerative.

58. On December 12, 2016, Hudson sent Retirement Board a Second Request for Production of Documents – Plan Neutral Physician Training Materials because he had not received

a response to his September 30, 2016 request for these materials. Hudson relied on ERISA regulations in support of his requests that state that a claimant shall be provided or given reasonable access to documents relevant to their claim. In response, Junk's December 19, 2016 letter stated that he refused to respond to Hudson's request for documents on the grounds that the documents requested were not relevant.

59. Hudson's counsel responded with a Follow-up Request for Production of Documents/Request for Information on December 29, 2016, again citing 29 C.F.R. 2560.503-1(m)(8) definition of "relevant documents." Junk responded with a letter dated January 10, 2017, maintaining that "[t]he Retirement Board's decision on Hudson's request for classification is final, it will not be reopened, and the Plan will not produce any of the documents you have requested."

CLASS ACTION ALLEGATIONS

60. Plaintiff brings this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of the following Class:

> All participants of the Plan who filed a claim seeking total and permanent disability benefits prior to January 1, 2015 and the beneficiaries of such persons.

61. Excluded from the Class are Defendants and persons who were named fiduciaries of the Plan, the officers and directors of the NFL Management Council, the officers and directors of the NFLPA, the members the immediate families of any of the foregoing; and legal representatives, successors, heirs, and assigns of any such excluded persons.

Impracticability of Joinder

62. The members of the Class are so numerous that joinder of all members is impracticable. The exact number of class members is unknown to Plaintiff. The Plan's most recent

Form 5500, the 2016 Form 5500 filed with the Department of Labor on December 20, 2017 reports that 3,716 retired or separated participants were actively receiving benefits as well as an additional 694 deceased participants whose beneficiaries were receiving or were entitled to receive benefits. The Plan's Form 5500 did not specify the number of those participants who are receiving disability benefits. According to the 2009 Retirement Plan Document, football-related disability rates were expected to be 0.10% per year for Active Players and 0.08% per year for inactive Players until age 45. Moreover, the Retirement Plan Document (Amended and Restated as of April 1, 2012) noted a significant increase in expected incidence of football-related disability: 0.35% per year for Active Players and 0.28% per year for Inactive Players up to 15 years after the player's last credited season. In the Report of the Segal Group to the Special Master as part of the NFL Concussion Litigation, 28% of the overall player population were expected to receive a qualifying diagnosis within their lifetime. Accordingly, there are hundreds, if not thousands of Plan participants who have been initially classified for disability benefits under the Plan who would be subject to the "changed circumstances" standard for reclassification.

Commonality

63. The issues of liability are common to all members of the Class and are capable of common answers as those issues include:

a. whether Defendants breached their fiduciary duties to Plaintiff, and members of the Class by failing to act prudently and solely in the interests of the Plan and the Plan's participants and beneficiaries in connection with their failure to disclose important issues related to the standards for reclassification and the meaning of "changed circumstances;"

b. whether the NFL Management Council and the NFLPA breached their duty to

monitor the Board Defendants; and

c. the appropriate remedies and relief for Defendants' violations and breaches.

Typicality

64. Plaintiff's claims are typical of the claims of other members of the Class because their claims arise from the same event, practice and/or course of conduct. Specifically, Plaintiff, on behalf of the Class, alleges that Defendants breached their fiduciary duties or otherwise violated ERISA in connection with the disclosures made to all participants with respect to the Plan's reclassification process. Plaintiff's claims are also typical of the claims of the Class because they generally seek recovery and relief that will result in a declaration and injunction for the Class.

Adequacy

65. Plaintiff will fairly and adequately represent and protect the interests of the Class.

66. Plaintiff does not have any interests antagonistic to or in conflict with those of the Class.

67. Defendants have no unique defenses against Plaintiff that would interfere with Plaintiff's representation of the Class.

68. Plaintiff is represented by counsel with extensive experience prosecuting class actions in general and ERISA class actions in particular.

Fed. R. Civ. P. 23(b)(1)(A)

56. The requirements of Fed. R. Civ. P. 23(b)(1)(A) are satisfied. Fiduciaries of ERISA-covered plans have a legal obligation to act consistently with respect to all similarly situated participants and to act in the best interests of the Plan and their participants. This action challenges whether Defendants acted consistently with their fiduciary duties or otherwise violated

ERISA with respect to activities that affected all class members uniformly. As a result, prosecution of separate claims by individual members would create the risk of inconsistent or varying adjudications that would establish incompatible standards of conduct relating to the Plan.

Fed. R. Civ. P. 23(b)(1)(B)

57. The requirements of Fed. R. Civ. P. 23(b)(1)(B) are also satisfied. Administration of an ERISA-covered plan requires that all similarly situated participants to be treated the same. Resolving whether Defendants each owed a fiduciary duty to the Plan, Plaintiff and members of the Class; whether Defendants fulfilled their fiduciary obligations to the Plan, violated ERISA or as to Plaintiff would, as a practical matter, be dispositive of the interests of the other participants in the Plan even if they are not parties to this litigation and would substantially impair or impede their ability to protect their interests if they are not made parties to this litigation by being included in the Class.

Fed. R. Civ. P. 23(b)(2)

58. The requirements of Fed. R. Civ. P. 23(b)(2) are satisfied as to the Class because Defendants have acted and/or failed to act on grounds generally applicable to the Class, making declaratory and injunctive appropriate with respect to the Class as a whole. This action challenges whether Defendants acted consistently with their fiduciary duties or otherwise violated ERISA as to the Class as a whole. The relief sought in this case primarily consists of declarations that Defendants breached their fiduciary duties or engaged in other violations of ERISA and injunctive relief. As ERISA is based on trust law, any monetary relief consists of equitable monetary relief and is either provided directly by the declaratory or injunctive relief or flows as a necessary consequence of that relief.

Fed. R. Civ. P. 23(b)(3)

59. The requirements of Fed. R. Civ. Pr. 23(b)(3) are also satisfied. The common questions of law and fact concern whether Defendants breached their fiduciary duties or violated ERISA to the Plan. As the members of the Class were participants in the Plan, their rights and benefits were affected by those breaches and violations. Common questions related to liability will necessarily predominate over any individual questions precisely because Defendants' duties and obligations were uniform to all participants and therefore all members of the Class. As relief and any recovery will be on behalf of the Plan, common questions as to remedies will likewise predominate over any individual issues.

60. A class action is a superior method to other available methods of the fair and efficient adjudication of this action. Resolution of the issues in this litigation will be efficiently resolved in a single proceeding rather than multiple proceedings and each of those individual proceedings could seek recovery for the entire Plan. Class certification is a superior method of proceeding because it will obviate the need for unduly duplicative litigation which might result in inconsistent judgments about Defendants' duties with regard to the Plan.

61. The following factors set forth in Rule 23(b)(3) also support certification:

a. The members of the Class have an interest in a unitary adjudication of the issues presented in this action such that this case should be certified under Rule 23(b)(1).

b. No other litigation concerning this controversy has been filed by any other members of the Class.

c. This District is the most desirable location for concentrating this litigation because the National Football League is headquartered in this District, Defendant NFL

Management Council is headquartered in this District and the individual Defendants are believed to have significant contacts in this District and at least some of the breaches took place in this District.

d. As the relief sought is primarily declaratory and injunctive, there are no management issues that present difficulties to manage this case as a class action.

COUNT I

Breach of Fiduciary Duty Pursuant to ERISA § 404(a)(A)(1)(A) & (B), 29 U.S.C. § 1104(a)(A) & (B) For Failure to Disclose Against the Board Defendants

62. Plaintiff incorporates and re-alleges by reference each of the foregoing paragraphs as if fully set forth herein.

63. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), requires that a plan fiduciary discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of (i) providing benefits to participants and their beneficiaries; and …. (B) with "care, skill, prudence, and diligence."

64. An ERISA fiduciary's duty of loyalty and prudence under ERISA § 404(a)(1)(A) and (B) includes a duty to disclose and inform. Those duties not only require that a fiduciary comply the specific disclosure provisions in ERISA, but also require (a) a duty not to misinform, (b) an affirmative duty to inform when the fiduciary knows or should know that silence might be harmful, and (c) a duty to convey complete and accurate information material to the circumstances of the participants and beneficiaries.

65. The Board Defendants had an affirmative duty to disclose that the term "changed circumstances" had been interpreted in a specific manner by the Board in advance of the time that

Plaintiff and the Class filed their initial claim for benefits seeking a determination of disability benefits under the Plan.

66. None of the materials provided by Board to Plaintiff, or upon information and belief other participants, defined the term "changed circumstances" or otherwise advised participants that there was a specific interpretation of the phrase "changed circumstances" until or after their last and final appeal of FD benefits.

67. Not until the Final Appeal on his request for reclassification did the Board Defendants advise Plaintiff, and upon information and belief, other participants that "the Board interprets Section 5.5(b)'s 'changed circumstances' requirement to mean a change in Player's physical condition—such as a new or different impairment—that warrants a different category of benefits."

68. By keeping the terms of the Plan intentionally vague and refusing to provide clarification in response to participant questions, the Board Defendants violated ERISA § 404(a)(1)(A) & (B), 29 U.S.C. § 1104(a)(1)(A) & (B).

69. By instructing those persons employed on its behalf (i.e. Plan Administrator), the to withhold information regarding the standard for "changed circumstances" from participants in response to inquiries, and to only provide participants with the language of the Plan and the SPD, the Board Defendants violated ERISA § 404(a)(1)(A) & (B), 29 U.S.C. § 1104(a)(1)(A) & (B)..

70. By failing to communication this information about the interpretation of the standard necessary to obtain a reclassification or to satisfy the conditions for eligibility for a benefit under a different category of benefits, the Board Defendants violated ERISA § 404(a)(1)(A) & (B), 29 U.S.C. § 1104(a)(1)(A) & (B).

71. As a result of this violation, Plaintiff and the other members of the Class were not properly informed that subsequently seeking reclassification and/or modification of their category of benefits would require a higher standard and that seeking any early application would unnecessarily lock themselves into a lower category of benefits.

COUNT II
Breach of Fiduciary Duty Under ERISA §§ 404(a)(1)(A), (B) and (D), 29 U.S.C. §§ 1104(a)(1)(A), (B) and (D) For Failure to Monitor Against the NFL Management Council and the NFL Players Association

72. Plaintiff incorporates the preceding paragraphs as though set forth herein.

73. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), requires that a plan fiduciary discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries, (A) for the exclusive purpose of providing benefits to participants and the beneficiaries of the plan, (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, and (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with ERISA.

74. Under ERISA § 404(a)(1)(A) and (B), a fiduciary with the authority to appoint and/or remove other fiduciaries has an obligation to undertake an appropriate investigation that the fiduciary is qualified to serve in the position as fiduciary and at reasonable intervals to ensure that the fiduciary who has been appointed remains qualified to act as fiduciary and is acting in compliance with the terms of the Plan and in accordance with ERISA.

75. Pursuant to Article 8.1 of the 2009 Plan Document, the NFL Management Council and the NFL Players Association each had the authority to appoint three voting members of the Retirement Board and also to remove and appoint a replacement for any member of the Retirement Board that they had appointed.

76. The NFL Management Council and the NFL Players Association did not have a system in place to monitor the Board Defendants, or had a defective system in place. Had the NFL Management Council and the Players Association had a proper and prudent system or practice in monitoring the Board Defendants, they would have been alerted by and taken action based on at least the following: (a) phone calls from Plan participants to the Players Association referred by the Plan Administrator expressing confusion regarding the standard for reclassification under the Plan; (b) the persistently high rate at which disability benefit denials under the Plan were litigated; (c) the Plan's widespread reputation for being among the most arcane, byzantine, and difficult to navigate benefit plans in the country; and (d) reports of insufficient administrative support and guidance from the Plan Administrator sufficient to assist the vulnerable population of Plan participants—with its high rate of mental disability—in navigating the Plan's processes. Had A prudent fiduciary faced with any of these facts would have undertaken a thorough investigation of the Plan's procedures, including for reclassification, and would have discovered the Board Defendants' persistent failures to disclose and efforts to conceal the standard for reclassification.

77. The NFL Management Council and the NFL Players Association knew or if they had a prudent process to monitor the Board Defendants should have known that the (a) SPDs did not set forth an explanation of what constituted "clear and convincing evidence" or "changed circumstances," (b) the Board Defendants had interpreted "clear and convincing evidence" or

"changed circumstances," (c) the interpretation of "clear and convincing evidence" or "changed circumstances," utilized by the Board Defendants was not the meaning of those terms and phrases as would be understood by the average participant in this Plan, (d) the Board Defendants did not disclose the meaning of those terms and phrases to participants until after their initial classification had been determined or until the participant sought reclassification (sometimes not until the final internal appeal), (e) the Board Defendants were deliberately attempting to keep the terms of the Plan as set forth in the SPDs vague and not providing participants with helpful information to navigate the process of obtaining benefits including reclassification, and (f) given the Board Defendants' interpretation and application of the phrases, "clear and convincing evidence" or "changed circumstances," participants would be harmed by applying for benefits before all the information and evidence was available to establish their proper classification.

78. Had the NFL Management Council and the NFL Players Association properly monitored the Board Defendants, the NFL Management Council and the NFL Players Association should have removed their respective appointees unless at least the following: (a) the Board revised the SPD to set forth an explanation of what constituted "clear and convincing evidence" or "changed circumstances" in language that the average participant in this Plan would understand, without the use of legal jargon and by using clarifying examples and illustrations; (b) the Board Defendants and the persons working for them as Plan Administrator disclose the meaning of "clear and convincing evidence" and "changed circumstances" prior to the time that participants sought initial classification, (c) the Board Defendants utilize a definition of "clear and convincing evidence" and "changed circumstances" consistent with their ordinary meaning as those terms and phrases would be understood by the average participant in this Plan, (d) the Board Defendants

review and reevaluate any claim for reclassification where the Board had failed to disclose the meaning of those terms and phrases to participants until after their initial classification had been determined, and (e) have a system in place to provide substantive, accurate and complete responses to inquiries by participants.

79. By failing to properly monitor the Board Defendants and/or failing to take appropriate action upon learning that the Board Defendants had breached their duties, the NFL Management Council and the NFL Players Association breached their fiduciary duties under ERISA § 404(a)(1)(A), (B) & (D), 29 U.S.C. § 1104(a)(1)(A), (B) & (D).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and the Class, prays that judgment be entered against Defendants on all claims, and request that the Court order or award the following relief:

A. Declare that each of the above fiduciary Defendants breached his, her or its fiduciary duties under ERISA.

B. Order that the Plan Administrator of the Plan must disclose the standards for reclassification in the SPD and in other disclosures in language understood by the average participant in this Plan, that such disclosures will not use legal jargon or legal terms and that the disclosures must use clarifying examples to explain the meaning of "clear and convincing evidence" or "changed circumstances" to Plan participants in those documents.

C. Declare that all denials of reclassifications by any member of the Class based on either lack of "clear and convincing evidence" or lack of "changed circumstances" under the Board's prior interpretation are void.

D. Enter an Order either (1) reforming the reclassification process and determining that the terms "clear and convincing evidence" and "changed circumstances" must be interpreted according to the ordinary meaning of those terms as understood by the average participant in this Plan or (2) determine that the initial classification is voidable at the option of each member of the Class and require that Defendants allow Plaintiff and each member of the Class to make a claim for benefits as their initial classification, whichever is in the best interests of the Class.

E. Order that to the extent that any of the members of the Class successfully obtain reclassification or increased benefits following the entry of this Court's Order, that Defendants must be pre-judgment interest from the date of their initial request for reclassification.

F. Impose a surcharge against the breaching fiduciaries in the amount of attorneys' fees or expenses incurred by Plaintiff and members of the Class who incurred such fees and expenses in connection with their initial request for reclassification which was denied utilizing Defendants undisclosed interpretation of the phrase "changed circumstances."

G. Order the removal any of the breaching fiduciaries from their position as fiduciaries for the Plan and enjoin any of the breaching fiduciaries from acting as fiduciaries for any plan that covers any members of the Class and to the extent necessary, appoint an independent fiduciary to act as the Retirement Board at the expense of the Defendants.

H. Require Defendants to pay attorney's fees and the costs of this action pursuant to ERISA §502(g)(1), 29 U.S.C. § 1132(g)(1) and/or ordering the payment of reasonable fees and expenses of this action to Plaintiffs' Counsel on the basis of the common benefit and/or common fund doctrine (and/or other applicable law) out of any money or benefit recovered for the Class and Subclasses in this action.

I. Award any such other relief that the Court determines that Plaintiffs and the Class are entitled pursuant to ERISA §502(a), 29 U.S.C. § 1132(a) and pursuant to Rule 54(c) of the Federal Rules of Civil Procedure or otherwise.

Dated: November 15, 2019

Respectfully submitted,

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